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Media Marketing Accountability Act: First Amendment Analysis

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Summary

The Media Marketing Accountability Act of 2001, S. 792 and H.R. 2246, 107th Congress, would "prohibit the targeted marketing to minors of adult-rated media." This report considers whether it would violate the First Amendment's guarantee of freedom of speech.[1]

Section 101(a) of the bill would make "[t]argeted advertising or other marketing to minors of an adult-rated motion picture, music recording, or electronic game" a violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Section 101(b) would in effect define "targeted advertising or other marketing to minors" as advertising or other marketing that "is intentionally directed to minors; or . . . is presented to an audience of which a substantial proportion is minors; or . . . the Commission determines . . . is otherwise directed or targeted to minors." Section 103 would authorize the FTC to prescribe rules that define when an audience is comprised of a substantial portion of minors and that "may include requirements for the purpose of preventing" targeted advertising or other marketing to minors.

Though the bill would prohibit targeting advertising or other marketing to minors of motion pictures, music recordings, or electronic games that their producers or distributors make "adult-rated," it would not require that any product be rated or labeled. Therefore, a producer or distributor of a motion picture, music recording, or electronic game who chooses not to rate or label his product would not be subject to the bill. Further, the bill would not prescribe criteria by which to rate or label products that are voluntarily rated or labeled. A producer or distributor who wished to rate or label his product could decide for himself how to do so, or could choose to follow an industry-wide system. The bill's purpose is apparently limited to prohibiting producers or distributors who voluntarily rate or label their products as being suitable only for adults from advertising or marketing them to minors.

[1] We analyze only Title I of the bill, as Title II would merely direct the FTC to conduct a study and to submit reports to Congress and to the public.

The bill would also leave to the producer or distributor (or to the FTC under section 102, discussed below) what age to deem a "minor," except that section 106(2) provides that, in no event would an individual 17 or older be deemed a minor, and, "[i]f no specific age is so established under the rating or labeling system in question, the term means an individual less than 17 years of age."[2] This apparently means that whether a producer or distributor was engaging in targeted advertising or other marketing to minors would depend upon the producer or distributor's own definition of "minor," except that, if that definition included individuals 17 or older, then the producer or distributor would not violate the law by marketing it to individuals 17 or older.[3]

Section 106(1) would define an "adult-rated" motion picture, music recording, or electronic game as one rated or labeled by the producer or distributor (whether individually or pursuant to an industry-wide system) in a manner that indicates that it is "appropriate or suitable only for adults" or one to which "access . . . by minors should be restricted." A music recording would also be deemed "adult-rated" if it were rated or labeled in a manner that indicates that it "may contain explicit content, including strong language or expressions of violence, sex, or substance abuse." Again, a motion picture, music recording, or electronic game would not have to be rated or labeled, and, if it were rated or labeled, would not have to be rated or labeled in a manner that made it subject to the bill. (It could, for example, be labeled as to its subject matter – comedy, western, etc.) If it were rated or labeled so as to be subject to the bill, however, then, to reiterate, section 101 would make it subject to section 5 of the FTC Act, unless the producer or distributor opted to adhere to the "voluntary self-regulatory system" that section 102 would direct the FTC to establish.

Section 102, which is titled "Safe Harbor," would permit producers or distributors who choose to rate their products to, in lieu of being subject to section 101, "adhere[ ] to a voluntary self-regulatory system" that the FTC would establish. Such system would include:

> (1) An age-based rating or labeling system for the product in question.
> (2) For all products that are rated or labeled as adult-rated under the system –
> (A) prohibitions on the targeted advertising or other marketing to minors of such products; and
> (B) other policies to restrict, to the extent feasible the sale, rental, or viewing to or by minors of such products.
> (3) Procedures, including sanctions for non-complying producers and distributors . . .

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[2] Despite the word "system," the bill would not require that there be a rating or labeling system.

[3] Note that, under the bill, if a specific age is "established," then that age, rather than "less than 17," would govern. Suppose that a rating or labeling system "established" "less than 12" as its definition of minor, but did not require that ratings or labels disclose that fact. The producer or distributor whose rating or label said merely something like "suitable for minors" could then market the product to an audience of 12-year-olds without engaging in what the bill would deem engaging in "targeted advertising or other marketing to minors." Nevertheless, if the FTC determined that the product was not suitable for 12-year-olds, it appears that, independently of the bill, it could find that the producer or distributor had falsely or deceptively rated or labeled the product (apart from whom it marketed it to) in violation of section 5 of the FTC Act.

First Amendment Analysis

The bill would affect two types of speech. It would prohibit advertising and marketing to minors of adult-rated motion pictures, music recordings, and electronic games; and it would place a disincentive on rating and labeling such products. The bill would place a disincentive on rating and labeling products because a producer or distributor may now rate or label his product as suitable for adults only, and face no penalty for advertising or marketing the product to minors, whereas, if the bill were enacted, he would be subject to a civil monetary penalty under the FTC Act for such advertising or marketing. Therefore, the bill could impose a possible financial burden on speech, and that, as well as outright censorship, may violate the First Amendment. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[4]

Both types of speech that the bill would affect – advertising and marketing, and rating and labeling – constitute what in the First Amendment context is called "commercial speech," and commercial speech is entitled to less First Amendment protection than non-commercial speech.[5] The Supreme Court has prescribed the four-prong *Central Hudson* test to determine whether a governmental regulation of commercial speech is constitutional. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, "it at least must concern lawful activity and not be misleading") and (2) "whether the asserted governmental interest [in restricting it] is substantial. If both inquiries yield positive answers," then to be constitutional the restriction must (3) "directly advance[ ] the governmental interest asserted," and (4) be "not more extensive than is necessary to serve that interest."[6]

The fourth prong is not to be interpreted "strictly" to require the legislature to use the "least restrictive means" available to accomplish its purpose. Instead, the Court has held, legislation regulating commercial speech satisfies the fourth prong if there is a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.[7] We now attempt to apply the *Central Hudson* test to the bill.

First prong. The first prong asks whether the speech at issue concerns a lawful product and is "not misleading." If it concerns an unlawful product, or if the speech is misleading, then the government may ban it and the matter is settled. The bill would make targeted advertising or other marketing to minors of adult-rated motion pictures, music recordings, and electronic games, subject to section 5 of the FTC Act, which makes

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[4] Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105, 115 (1991).

[5] Commercial speech is "speech that *proposes* a commercial transaction." Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original). A rating or label, if communicated by the producer or distributor (as opposed to by a person with no interest in selling the product), is communicated in the context of a proposed commercial transaction.

[6] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).

[7] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989).

unlawful "unfair or deceptive acts or practices in or affecting commerce." Section 101(a) of the bill, in fact, says:

> The targeted advertising or other marketing to minors of an adult-rated motion picture, music recording, or electronic game, in or affecting commerce, shall be treated as a deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and is hereby declared unlawful.

The bill thus would "treat" marketing adult-rated material to minors as deceptive, and deceptive advertisements, under the first prong of the *Central Hudson* test, may be banned.[8] This does not settle the question, however, because the fact that the bill would "treat" marketing adult-rated material to minors as deceptive would not make it deceptive. Whether it is deceptive for purposes of the *Central Hudson* test would be for the courts to decide.

The bill, as noted, would in effect define "targeted advertising or other marketing to minors" as advertising or other marketing that "is intentionally directed to minors; or . . . is presented to an audience of which a substantial proportion is minors; or . . . the Commission determines . . . is otherwise directed or targeted to minors." Perhaps intentionally directing to minors advertisements for adult-rated products would be deceptive, in that it might be construed to imply that the rating or label did not mean what it said. But a strong case could be made that to advertise an adult-rated product to an audience of which a substantial proportion is minors would not be deceptive, especially if the advertisement stated clearly that the product was not suitable for minors. An audience with a substantial proportion of minors might, after all (depending upon how the FTC defines it), contain a significant number of adults, and the Supreme Court said in *Bolger v. Youngs Drug Products Corp*. that "the government may not 'reduce the adult population . . . to reading only what is fit for children.'"[9]

The Court actually has said this in a number of cases, but we cite *Bolger* because it was a commercial speech case that struck down a statute with a similarity to the bill. The statute in *Bolger* prohibited the mailing of unsolicited advertisements for contraceptives, and the Court struck it down despite recognizing that it served to assist some "parents who desire to keep their children from confronting such mailings."[10] This governmental interest seems similar to one that might be asserted in support of the bill. We do not mean to suggest, however, that *Bolger* would be sufficient by itself to lead a court to find the bill unconstitutional. This is because the statute in *Bolger* totally banned non-deceptive advertisements for a legal product, whereas the bill would ban advertisements and marketing (which it would deem deceptive) only if directed to minors (though it would limit adults' access to them as well if they were in an audience comprised of a substantial portion of minors), and would place a disincentive on, but not ban, rating and labeling certain products.

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[8] Although the first prong, as quoted above, uses the word "misleading," the Court also said in *Central Hudson* that "[t]he government may ban forms of [commercial] communication more likely to deceive the public than to inform it . . . ." There seems no basis to distinguish "misleading" from "deceptive."

[9] 463 U.S. 60, 74-75 (1983).

[10] *Id*. at 73.

In applying the first prong of the *Central Hudson* test, we have thus far considered only the bill's ban on advertising and marketing to minors. If we consider the disincentive that it would place on ratings and labeling products, then it is even clearer that the commercial speech at issue concerns a lawful activity and is not misleading. This is because the bill's disincentive would apply to ratings and labels that are not misleading. (It may apply to those that are misleading, but those that are already violate the FTC Act.) Thus, we must proceed to the rest of the *Central Hudson* test.

Second prong. The second prong of the *Central Hudson* test asks whether the government has a substantial interest in limiting the commercial speech in question. The bill's findings state its purposes, which are essentially to prevent the exposure of minors to media violence. A court would likely find this to constitute a substantial interest, because the Supreme Court has held that a government's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest."[11]

Third prong.

The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." We have observed that "this requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'"[12]

It appears from this quotation that whether the bill passes the third prong will depend in large measure upon the evidence that the government presents in a trial challenging its constitutionality. A court might consider evidence on questions such as: Is media violence in fact harmful to minors? Are media portrayals of sexual material harmful to minors?[13]

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[11] Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 341 (1986).

[12] Greater New Orleans Broadcasting v. United States, 527 U.S. 173, 188 (1999) (citations omitted).

[13] In a case challenging a restriction on sexual material on cable television, a three-judge federal district court wrote: "The [Federal] Government presents no clinical evidence linking child viewing of pornography to psychological harms. Rather, the Government argues by analogy to clinical studies showing the effect of child viewing of televised violence as well as anecdotal evidence of the effects of sexually explicit television. The reference to televised violence research is weakened by the lack of evidence establishing the appropriateness of the analogy. Even if watching televised violence causes children to be violent, should the same hold true for televised sex? We cannot say that it would. . . . We are troubled by the absence of evidence of harm . . . ." Playboy Entertainment Group, Inc. v. United States, 30 F. Supp 2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000). Nevertheless, the court wrote: "The Supreme Court has not required empirical proof of harm to justify content-based restrictions on constitutionally protected speech when children are involved. . . . Only some minimal amount of evidence is required when sexually explicit programming and children are involved." *Id*. at 715, 716. Therefore, the court found a

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Does advertising or marketing of adult-rated products itself convey violent or sexual material? Do retailers enforce adult ratings to the extent that advertising or marketing adult-rated products to minors does not significantly increase the likelihood that minors will view or listen to those products?[14] Is the bill likely to decrease significantly voluntary rating and labeling and thereby work counter to its stated purpose?

Fourth prong.

The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest – "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." On the whole, then, the challenged regulation should indicate that its proponent "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."[15]

In applying the fourth prong, a court might ask (complementing its inquiry as to the third prong) whether it might be more reasonable for Congress to require that theaters, electronic game arcades, and music and video retailers enforce existing ratings and labels (though this too might raise constitutional questions) than that it prohibit advertising or marketing of adult-rated products to minors. If enforcing existing rating and labels would be more reasonable, that would not necessarily make the bill unconstitutional, because in commercial speech cases the Supreme Court does not require the government to use the least restrictive means to further its interest. Nevertheless, the possible superiority of an alternative means could be a factor in a court's decision.

A court applying the fourth prong might also consider the extent to which the bill would limit adults' access to commercial speech concerning adult-rated products. The extent to which it would would depend upon how great a disincentive to rating and labeling the bill proved to be, and upon how the FTC defined through regulation when an audience is comprised of a substantial portion of minors.

Because a court's decision on the bill's constitutionality would apparently depend on the evidence presented to it, it does not seem possible to predict what its ruling would be. Congress might increase the likelihood of the bill's being upheld if it developed a legislative history of the bill that contained persuasive evidence with regard to the questions suggested above that a court might consider.

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[13] (...continued)
sufficient governmental interest (though it struck down the statute for other reasons). Though the Supreme Court may not have required empirical proof of harm in the context of sexual material on cable television, in the commercial speech context, as noted above, it requires the government to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

[14] The Supreme Court has "acknowledged the theory that product advertising stimulates demand for products, while suppressing advertising may have the opposite effect." Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2423 (2001).

[15] *Greater New Orleans*, *supra* note 12 (citations omitted).